common nuisance, obstructing the navigation of the Ohio River; but before that judgment was carried into effect it was considered that there was no reason now for carrying that judgment into execution.

Mr. Justice NELSON here thus lays down the rule of law as to streams exclusively under state control: "The purely internal streams of a state, which are navigable, belong to the riparian owners to the thread of the stream," and they have a right to use them "subject to the public right of navigation." They may construct wharves, or dams, or canals, for the purpose of subjecting the stream to the various uses to which it may be applied, subject to this public easement. But if these structures materially interfere with the public right, the obstruction may be removed or abated as a public nuisance." "These purely internal streams of a state, as to the public right of navigation, are exclusively under the control of the state legislature." And although erections authorized by grant from the state legislature cause "real impediment to the navigation," they are nevertheless lawful, and the riparian owner has no redress. This subject is somewhat considered in Morgan *vs.* King, 18 Barb. 277.

There can be no question, we think, that the rule of law that the internal rivers of a state in a section of country where rafting and floating logs is of essential interest, are to be regarded as in the nature of public highways, for that purpose open to the free use of all who have occasion so to use them, is founded in the soundest principle; and that it is, in fact, nothing more than the reasonable extension of the former rule by which navigability has been referred to the necessities of the circumstances and condition in which the people and the country are placed. I. F. R.

Supreme Court of Pennsylvania.

TWELLS *vs.* THE PENNSYLVANIA RAILROAD COMPANY.

Though a railroad company may have power under special statutes to discriminate in its rates of charge between "local" and other freights, yet it cannot make any such discrimination on the ground that certain freight is to be carried to its final destination by another route after reaching the terminus of the company's road.

The opinion of the court was delivered by

STRONG, J.—The substantial question in this case is, whether the defendants may rightfully demand from the complainant higher rates for transporting over their railroad coal oil consigned to him at Philadelphia, and received by them for carriage at Pittsburgh, than they demand of shippers generally from the same place of loading to the same place of delivery, merely because the com-

plainant intends to send the oil afterwards to New York. Does the place of final destination, if beyond the terminus of the defendants' road, justify an increase of the charge made for transporting over the road itself, freight thus destined, over the rate established for similar freight destined for the terminus itself? It is to be observed that the railroad of the defendants is wholly within this state; that it does not extend beyond Philadelphia eastward, nor westward beyond Pittsburgh. It is also to be noted that the oil delivered to the defendants at Pittsburgh for carriage, and upon which the charges complained of are made, is a domestic product of the state, and as such is entitled to the spirit of the protection (if not to its letter) extended by the commutation tonnage tax of 1861 to domestic products. If transported from Pittsburgh to any eastern market, it must pass over the road of the defendants. It has no other available route.

The general duty of railroad companies to make no discrimination between parties offering goods to them for transportation is admitted, as, indeed, it must be. Different kinds of freight may be subjected to different charges, but generally, advantages cannot be given to one shipper, or class of shippers, greater than those which are allowed to all others. When such companies furnish cars and motive power, and when they become common carriers, they are under obligation to receive all goods offered to them for carriage, to transport them in the order of their receipt, and at rates of compensation that are alike to all. When the service is the same, the compensation demanded must be the same also. And the rule is not the less general or imperative because there are some seeming qualifications to it. It may be that it is competent for a railroad company to enter into special agreements whereby advantages may be secured to individuals in the carriage of goods upon their railway, if it is manifest that in entering into such agreements they have only the interests of the company in view, and when they are willing to afford the same facilities to all others on the same terms. Thus it has been held that railway companies may agree to carry at less than the ordinary charges, in consideration of a guarantee of large quantities and full trainloads at regular periods, provided the real object be to obtain

thereby a greater remunerative profit by the diminished cost of carriage, although the effect may be to exclude from the lower rate those persons who cannot give such a guarantee. *Nicholson* vs. *The Great Western Railroad Company*, 94 Eng. Com. L. Rep. 366. *In re Oxlade*, 1 Com. Bench N. S. 453; *Ransom's Case*, 1 C. B. 437. But these qualifications of the general rule, if they may be called qualifications, have nothing to do with the present case. They rest upon a different principle. They are allowable only when the exceptional regulation has reference primarily to the interests of the company, rather than to the advantage of a particular shipper or class of shippers, and allowable only when they relate to transportation over the company's own railroad. In *Baxendale* vs. *The Great Western Railway Company*, 94 Eng. Com. Law Rep. 366, Chief Justice COCKBURN noticed this distinction as follows: "It may be convenient to advert to a distinction not always kept sight of in argument, between cases in which the interest of the company sought to be promoted by the regulation or act complained of, is one with reference to the railway itself as to which the question occurs, and those in which the benefit sought to be obtained by the company is one which has reference to interests distinct from the particular railway; as where, for example, the company are proprietors of another railway, or carry on some other business. In the latter class of cases it appears to us clear that the company must be taken to be, quoad the particular railway, in the position of third parties, and that they cannot, with a view to such separate interest, give an undue preference, or impose an unreasonable disadvantage, any more than they could do so to promote the interest of any other party." These observations are founded in sound reason, and they commend themselves to us as indicating a rule of substantial justice. They fit the case now in hand, and solve it without difficulty.

The defendants are authorized by their charter to be common carriers on their railroad from Pittsburgh to Philadelphia, with power to establish, demand, and receive such rates of toll, or other compensation, for the transportation of merchandise and commodities as to the President and Directors shall seem reasonable. It is ad-

mitted that, in the exercise of these powers, they must treat all customers alike. Now it is clear that if they receive coal oil at Pittsburgh, to be carried to Philadelphia, it can make no difference to them, either in the risk or cost of transportation, whether Philadelphia is the point of ultimate destination of the oil, or whether the consignee intends that it shall afterwards be started anew, on another line, and forwarded from Philadelphia to New York. The point of final destination of the freight is a matter in which they have no interest as carriers over their own road. If it be admitted that they may contract to carry freight to points beyond Philadelphia or Pittsburgh, over connecting lines, it is still true that as to all carriage beyond the termini of their own road, they stand in the position of third parties, and they can no more secure to themselves an advantage over other carriers on the connecting lines by discriminating in tolls on their own, than they could secure similar advantages to one shipper over another in the same way. Yet this is the practical effect of the regulation which the defendants are seeking to enforce against the complainant, and we cannot doubt that such is their object in making it. They in reality say to him, "Employ us to carry your oil, not only over our road to Philadelphia, but thence to New York. If you do not, we will exact from you, for its carriage to Philadelphia, six cents per hundred pounds more than we demand from all others who employ us to transport similar freight only to Philadelphia. Or, if you will employ us to carry it to New York after it shall have reached Philadelphia, we will carry it to Philadelphia for six cents less per hundred pounds than we are accustomed to charge others for similar transportation." No one will maintain that they can lawfully make such a stipulation for the benefit of a third party, *e. g.*, one of two other carriers. They cannot say to a shipper, at Pittsburgh, of any domestic product, "You have freight destined to New York. You must send it over our road to Philadelphia. If, when it arrives there, you will forward it by A to New York, we will carry it over our line at certain rates. If you send it by any other than A our charges will be higher." This is a discrimination that cannot be allowed. Conceding it, would put in the power of the defendants a monopoly of the

carriage of all articles which pass over their road from either terminus to every place of final delivery. The oppressive effects of such a rule are the same, whether its motive be to benefit third parties, or the railroad company itself. Of transportation along the line of their road, the defendants practically have a monopoly. It is not consistent with the public interests, or with common right, that they should be permitted so to use it as to secure to themselves superior and exclusive advantages on other lines of transportation beyond the ends of their road. If they contract to carry freight to distant points in other states and countries, they should stand on the same footing with other carriers, over other roads and lines than their own. If they may use their exclusive powers over their road so as to force into their own hands all external carrying trade, and do this at the expense of a shipper or class of shippers, it is quite possible for them to exclude one domestic product from all foreign markets. Shippers of such products might be compelled to seek a final market in Philadelphia, under penalty of such increased rates of toll beyond as to make it impossible for them to find any other place of sale. These consequences, more or less aggravated, according to the will of the defendants, and according to interests they may have distinct from those which belong to them as owners of their road, flow naturally from permitting the destination or use to be made of freight after it has left the road, to affect the price of carriage over it. In *Baxendale* vs. *The Great Western Railroad Company*, already cited, it was held that the company could not secure to themselves a monopoly of the delivery of goods beyond the termination of their road by a general regulation charging a gross price for carriage on the road, including the cost of such delivery, to all persons, whether they receive their goods at the station or beyond. In other words, they were not allowed to make use of their rights over their road to secure to themselves advantages beyond it. That there are special provisions in the English charters against granting special privileges to individuals or classes of men, makes no difference, for they are but declaratory of the common law. *Sanford* vs. *The Catawissa Railroad Company*, 12 Harris 378.

We hold, then, that the rule of the defendants of which the complainant complains, is unreasonable, and such as they have no legal right to enforce. The apology set up for it is not sufficient. That the imposition of higher rates for carrying the complainant's oil to Philadelphia, because it is afterwards to be forwarded in some way to New York, is necessary to prevent his having an advantage in the New York market over those who employ the defendants to transport all the way, or over those who send oil from Pittsburgh to New York with through bills of lading, is a matter outside of their control. It has no proper relation to them as carriers.

An injunction will therefore be issued according to the prayer of the bill, and an account will be decreed of the excess over the usual or ordinary rates of freight heretofore paid by the complainant to the defendants, and the amount found by such account to have been paid in excess of the ordinary rates of charge for transportation from Pittsburgh to Philadelphia, will be decreed to be paid to the complainant, together with interest and the costs. The account is not to include anything more than such excessive charges and interest.

At the same term of the court the case of Shipper *vs.* The Pennsylvania Railroad Company was decided in favor of the company by the same judge who delivered the above opinion. The difference between the cases was simply this: that whereas in the one case the company attempted to discriminate on the ground of ultimate destination, in the other they claimed precisely the same right on the basis of origin or initial point of transportation of freight. As respects this particular company, therefore, the law seems to be settled that on freight started from a point beyond the state and coming to their road for further transportation they may charge tolls at higher rates than on freight, the transportation of which commences within the state. The decision in Shipper *vs.* The Pennsylvania Railroad Co. rests upon the construction of the words "local freight," in a statute, which, while in terms providing a maximum rate as the price of a release from a state tax on tonnage, is by this construction made to justify an exception to the general rule of equality so well stated in the above opinion. "Local freight" in the statute referred to, says the learned judge, "was not simply what was owned by citizens of Pennsylvania, not exclusively domestic products even, though they were doubtless largely in the minds of the legislature, but articles transported in the prosecution of our own internal trade as contrasted with those brought from abroad into the state or carried through by a continuous transit." The case and the statute as well as its construction being "exceptional," have not of themselves a very important

bearing upon the general principles of American Railroad Law, but some expressions of the learned judge in the introductory part of the opinion, and particularly the limitation upon the duty of equality of charge to persons offering freight "in like circumstances," have led to a somewhat closer examination of what in the above opinion are accurately defined as the "seeming qualifications" of the general rule that "when the service is the same, the compensation demanded must be the same also."

C. J. LEWIS, in Sanford *vs.* The Catawissa Railroad Co., 12 H., p. 378, after deducing the duty of public accommodation from the grant of the power to take private property, says: "The right to take tolls is the compensation to be received for the benefits conferred. If the public are entitled to these advantages, it results from the nature of the right that the benefits should be extended to all alike, and that no special privileges should be granted to one man or set of men and denied to others. The special stipulations inserted in charters for the purpose of securing these rights, are placed there in abundance of caution, and affirm nothing more than the common right to equal justice which exists independent of such provisions." It would seem to follow from this that the public accommodation is paramount to considerations of private profit to the company, even when that profit is the mere profit of carriage over their road, and that they may not charge the man who furnishes them with a car-load of wheat to be carried more in proportion to weight and distance than the man who furnishes but one bushel, because it may cost them much less in proportion to weight to transport the full car-load than to transport the one bushel, *e. g.*, in a car in which they have no other freight to be carried. English cases are sometimes cited to show that a company may charge a less rate than the usual one to customers who by furnishing freight in large quantities or at stated times, enable the company to transport their freight at a less cost per pound than the ordinary average cost, and in such cases the companies do not seem to have been held strictly to showing that the reduction in rate corresponded exactly with the diminution in the cost of transportation. See, besides cases cited in the above opinion, Strick *vs.* The Swansea Canal Co., Law Times Reports, May 28, 1864, p. 460. But it is to be observed that these decisions are made under a statute giving a remedy for "*undue* preference or prejudice," which makes the court the arbiter between the public and the corporation of the reasonableness or unreasonableness with respect to the interests of the company as carriers, of discriminations in rates of freight. That the line has been pretty strictly drawn, and that the company have been obliged generally to show that the discrimination was founded either upon an immediate benefit to them in the reduction of average cost of transportation, or a resulting benefit by the increase of tonnage carried, will be seen by a reference to the cases. Among those not cited in the opinion above are Crouch *vs.* The Railway Co., 2 Car. & Kir. 789; Parker *vs.* Great Western, 11 Common Bench 545; Pickford *vs.* The Grand Junction, 10 Mees. & Welsby 399; Baxendale *vs.* The Great Western (Bristol Case) 94 E. C. L. R. 309; Piddington *vs.* The S. E. Railway Co., 94 E. C. L. R. 111; Garton *vs.* Railway Co., 101 E. C. L. R., p. 112.

But in the absence of such statutory regulations, a qualification that allows the carrying company, with a pretended view to a resulting benefit to itself, to aid any customer in building up a business in the conduct of which large amounts of freight will come upon the

road, by charging him less than the ordinary rates of toll or freight, violates the principle that "when the service is the same, the compensation demanded must be the same also." On the other hand, the more plausible qualification of a difference in rates of toll or freight founded on the actual cost or risk to the company of transportation, is no less destructive of the fundamental idea that the benefits of a railway company should be extended to all alike. In fine, to admit that "circumstances" may justify discriminations or preferences, except in so far as we may, following the English cases, somewhat inaccurately include under that term, the kind or description of package, the time and order of offering for transportation and such incidents as have a direct relation to cost, priority, or risk of carriage, is to place it in the power of the carrying company to discriminate in favor of one man or one class or set of men, a power utterly subversive of the controlling object and purpose of the grant by the state to them of special privileges.

C.

United States District Court, Eastern District of Missouri. Special Term, September, 1862.

UNITED STATES *vs.* ONE HUNDRED BARRELS OF CEMENT *et al.* HICKS & COCKE, CLAIMANTS.

By the Act of Congress of 13th July, 1861, and the President's Proclamation in pursuance thereof, citizens of the rebellious states have *primâ facie* become, for purposes of commerce, *quasi* enemies, and cannot sue in the United States courts.

But the President having power, through the secretary of the treasury, to make regulations permitting trade in certain cases, the granting of a license, in pursuance of this power, restores the standing of the grantee, so as to enable him to be heard in the United States courts.

The act of foreign nations in recognising the so-called Confederate States as a belligerent, estops their subjects from disputing the lawfulness of captures on the high seas by the United States forces. But such recognition has no influence on the courts of the United States, who are guided solely by the action of the political department of their own government.

Therefore, in determining the status of rebel persons and property, the courts are guided by municipal and not by international law.

The Acts of Congress of 13th July 1861, and 20th May, 1862, are prohibitory acts, and the forfeiture under them of goods "proceeding to" rebellious states, can only be avoided by the production of such a license as is provided in the acts. Therefore, a license obtained through error, or mistake, or fraud, will not prevent the forfeiture.

Libel of information for violation of the 5th Section of the Act of Congress, approved July 13th, 1861.